BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments	)	MB Docket No. 07-51

COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby responds to the above-captioned Further Notice of Proposed Rulemaking ("*Further Notice*").[1] In the *Further Notice*, the Commission seeks comment on expanding the rules it adopted in the *MDU Order*[2] by, among other things, expanding the prohibition on exclusive access agreements to all multichannel video programming distributors ("MVPDs"). Comcast emphatically believes that the Commission does not have the legal authority or factual predicate necessary to justify the steps it took in the *MDU Order*, as fully explained in its earlier comments in this proceeding. Nevertheless, to the extent that the *MDU Order* stands, the *Further Notice* provides the Commission with the opportunity to redress the competitive disparities created by its initial decision.

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1 *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶¶ 61-66 (2007) ("*Further Notice*" or "*MDU Order*", as appropriate).

2 *Id.* ¶¶ 30-35.

I. THE COMMISSION MUST CORRECT THE COMPETITIVE IMBALANCE IT CREATED IN THE *MDU ORDER*.

The Commission's decision to prohibit certain MVPDs from entering into or enforcing new or existing exclusive access agreements was based on a policy determination that such agreements between MVPDs and MDUs constituted "unfair methods of competition,"[3] and that action by the Commission was necessary to "ensure that 'no segment of the population is denied the benefits of video competition.'"[4] The Commission's decision, however, does not achieve this professed goal.

Rather, in drawing an arbitrary line by prohibiting exclusive access agreements only as to MVPDs directly and indirectly subject to Section 628(b), but not other MVPDs, the Commission unnecessarily and illegally has placed its "thumb on the scale"[5] in favor of certain competitors, contrary to Commission precedent,[6] and ultimately harming consumers. Assuming the Commission chooses not to rescind the *MDU Order*, the next best thing the Commission can

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3 *MDU Order* ¶ 1.

4 *Id.* ¶ 18 (*citing* Consumers Union *Ex Parte* at 2).

5 *See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*Franchising Order*") (Separate Statement of Commissioner McDowell).

6 *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007) (Separate Statement of Commissioner McDowell) ("it is important that the Commission's regulations treat all competitors the same when possible"). *See also Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶ 6, 21-26 (2007) (stressing the Commission's policy to treat like services alike to ensure competitive neutrality in the broadband marketplace); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 16-17 (2005) (same).

do, and the only way to achieve Chairman Martin's oft-stated goal of "eliminat[ing] this anti-competitive practice,"[7] is to apply the prohibition equally to all MVPDs.[8]

The primary problem with the situation created by the *MDU Order* is that it does not increase competition for consumers who live in MDUs. If the goal is to maximize the choice of video service providers available to each individual household in an MDU, as the Commission asserts in the *MDU Order*,[9] there is no more reason to allow DIRECTV or Dish Network -- or those who resell their services -- to have exclusive access contracts than to allow Comcast or Verizon to have them. From the standpoint of the consumer residing in the MDU, *any* exclusive access agreement would have the same effect on consumer choice; it does not matter whether the MVPD with exclusive access rights is a franchised cable operator, a DBS provider, a private cable operator ("PCO"), or anyone else. Yet, under the *MDU Order*, a building owner that previously had an exclusive access agreement with a cable operator is perfectly free to replace that agreement with an exclusive agreement with a PCO or DBS provider or affiliate. The building resident who had one "choice" before still would have only one "choice." This

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7 Remarks of Kevin J. Martin, Chairman, Federal Communications Commission, Rainbow Push Coalition 11th Annual Wall Street Project Economic Summit, at 2 (Jan. 9, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279381A1.pdf.

8 Of course, neither the Commission's actions in the *MDU Order* nor the actions proposed in the *Further Notice* will "prohibit[] building owners from denying residents a choice among video service providers." *Id.* at 2. The only way to actually accomplish that goal would be to impose a national mandatory access regime, a step that would explicitly impinge on building owners' rights in ways the Commission has never proposed.

9 *See MDU Order* ¶ 19 ("exclusivity clauses deny consumers in a part of the market the benefits that could flow to them, and exclusivity clauses confer few, if any, benefits on those consumers").

obviously produces none of the benefits the Commission claimed when it adopted the *MDU Order*.

In another sense, consumer welfare actually has been harmed by the *MDU Order*. By forbidding some, but not all, MVPDs from trading exclusive access privileges for price concessions and service improvements, the *MDU Order* reduces competition to serve MDUs and reduces the benefits that building owners can obtain for their residents. That undoubtedly harms the residents of these MDUs. Further, by adopting rules that treat competitors differently, the Commission has distorted and diminished competition and, ironically, weakened the position of the only competitors that are subject to build-out and anti-redlining obligations and who have committed to serve all consumers without regard to income.[10] Rules that unnecessarily skew competition, such as those adopted in the *MDU Order*, will not benefit consumers of voice, video, and broadband Internet services.[11]

Despite some of the conclusions drawn by the Commission in the *MDU Order*, competition to serve MDUs is intense. There are, in fact, more MVPDs that serve MDUs than

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[10] *See* 47 U.S.C. § 541(a)(3). The Commission has concluded that many of the build-out requirements by which most cable operators must abide are not applicable to other MVPDs, such as Verizon and AT&T. *Franchising Order* ¶ 89. Further, as Comcast has made clear at several points in this proceeding, Verizon and AT&T have used their freedom from build-out requirements to evade lower-income populations entirely, casting significant doubt on the Commission's unsupported assumption that adoption of the *MDU Order* would help bring competition to all consumers. *See*, *e.g.*, Ex Parte Letter of Daniel K. Alvarez, Counsel to Comcast Corporation, to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 07-51 (filed Oct. 24, 2007) (demonstrating that in many states, despite the existence of mandatory access statutes, the ILECs have shown little desire to serve low-income MDUs).

[11] Of course, where Congress has directed the Commission to treat different providers of a particular service in different ways, the Commission is bound by Congress' directives. But Congress has not done so with respect to MDU exclusive access agreements.

there are that serve non-MDU households.[12] Many MVPDs use exclusive access agreements in some, if not all, of the MDUs they serve. There was substantial evidence on the record that PCOs provide multichannel video services to MDU residents via exclusive access agreements.[13] There is also evidence that DIRECTV and Dish Network, on their own or through affiliates and resellers, make use of exclusive access agreements.[14] For the many households who are still subject to these agreements, the Commission's purported goal of consumer-based competition will remain unfulfilled if the competition-skewing effects of the *MDU Order* are not corrected.[15]

The *MDU Order* also fails to meet the Commission's stated goal of encouraging increased offering of a "triple play" of voice, video, and broadband Internet service to consumers

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[12] As Comcast explained in its earlier comments in this proceeding, this is because an MVPD does not necessarily need a franchise to serve most MDUs, such as apartment buildings and condo buildings. *See* Comments of Comcast Corporation, MB Dkt. No. 07-51, at 5 n.10 (filed July 3, 2007) (citing *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 13 FCC Rcd 1034 ¶ 129 (1998)) ("Comcast Comments"). *See also id.* at 16.

[13] *See*, *e.g.*, Comments of OpenBand Multimedia, MB Dkt. No. 07-51 (filed July 2, 2007); Reply Comments of Ygnition Networks, MB Dkt. No. 07-51 (filed July 11, 2007).

[14] For example, MDU Communications, a reseller of DIRECTV service, noted in its most recent Annual Report that it "continues to concentrate its efforts on bulk and exclusive type service deployments" and that "its growing presence in the Southeast and Mid-Atlantic is also expected to generate a significant number of exclusive type access agreements." MDU Communications 2006 Annual Report at 16, *available at* http://www.mduc.com/PDF/Annual%20Report%2006%20Final%20May%208.pdf#zoom=100. Also, DirecPath, which filed earlier in this proceeding about the importance of exclusives to its business, *see* Letter of Mr. Paul Savoldelli, CEO, DirecPath, to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 07-51 (filed Aug. 6, 2007), delivers "the DIRECTV experience" according to its website, *see* http://www.direcpath.com/, and People's Choice Cable, which also recently filed a letter with the Commission extolling the virtues of exclusive access agreements, *see* Letter of Mr. Steve Friedman, CEO, People's Choice Cable, to Ms. Monica Desai, Chief, Media Bureau, Federal Communications Commission, MB Dkt. No. 07-51 (filed Jan. 29, 2008), touts access to both DIRECTV and Dish content, *see* http://www.peopleschoicecable.com/.

[15] The *MDU Order* claims that minorities were the disproportionate beneficiaries of the Commission's benevolence because minority-headed households make up a disproportionately large segment of the MDU population. *See MDU Order* ¶ 18. It follows that minorities are also disproportionately *harmed* by the Commission's decision not to include PCOs, DBS operators and affiliates, and other MVPDs in the prohibition on exclusive access agreements.

to whom the triple play is not now available.[16] By the Commission's own logic, if "exclusivity clauses reduce competition in the provision of triple play services and result in inefficient use of communications facilities,"[17] those consumers still subject to exclusive access agreements with certain MVPDs are still harmed, particularly since those MVPDs currently not subject to the *MDU Order* typically are not offering triple play services. Further, because the cable inside wiring rules may operate to force cable operators to turn over their facilities to MVPDs who are allowed to have exclusive access agreements, many residents could lose their only competitive choice for broadband and telephone service if one of those MVPDs ultimately enters into an exclusive agreement to serve the property.[18] That being the case, the benefits of the triple play will be lost to many consumers so long as the exclusive access ban is applied only to some, but not all, MVPDs. This central policy objective will not be met if the Commission does not treat all MVPDs equally with respect to exclusive access agreements.

II. THE COMMISSION HAS AT LEAST AS MUCH AUTHORITY TO ACT WITH RESPECT TO MVPD SERVICES THAT ARE DELIVERED BY RADIO AS IT DOES WITH RESPECT TO MVPDS COVERED BY THE *MDU ORDER*.

A Commission decision to level the playing field in the MDU marketplace would be within the boundaries of Commission authority as defined in the *MDU Order*.[19] The Commission already concluded that it has the necessary ancillary authority, even without Section

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16 *See id.* ¶¶ 19-21.

17 *Id.* ¶ 21.

18 This effect will be particularly pernicious in light of the Commission's decision to convert "home run wiring" into "home wiring" in last year's *Sheetrock Order*. *See* Comcast Comments at 9-10.

19 *See MDU Order* ¶ 52.

628(b), to impose the prohibition on MDU exclusive access agreements. If that is correct, then there is no apparent reason why that same ancillary authority cannot be used to impose the same prohibition on other MVPDs. If anything, the Commission would seem to have greater authority to impose such a prohibition on certain MVPDs that were conspicuously not covered by the *MDU Order:* DBS operators in particular.

Since 1927, this Commission and its predecessor agency have had plenary authority over all non-governmental uses of the public airwaves. Unlike the Commission's authority over common carriers or cable operators, this authority is not shared with state commissions or local franchising authorities. No use of the public airwaves may be made unless licensed by the Commission,[20] and no such license shall be granted except upon a determination that "the public interest, convenience, and necessity would be served by the granting thereof."[21] Given the *MDU Order's* conclusion that exclusive access agreements constitute "unfair and deceptive acts or practices," and "that it is strongly in the public interest to prohibit such clauses from being enforced,"[22] it must also be the case that the use of these agreements in connection with use of the public airwaves is not in the "public interest" -- the standard for Commission action under the relevant sections of Title III.[23]

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[20] 47 U.S.C. § 301(a).

[21] *Id.* § 309(a).

[22] *MDU Order* ¶ 23.

[23] *See*, *e.g.*, 47 U.S.C. § 303(b).

The "public interest" is also the touchstone for Commission action under Section 335, which governs DBS providers. Section 335 directs the Commission "to impose, on providers of direct broadcast satellite service, *public interest or other requirements for providing video programming*."[24] Given the Commission's claim that "[a] rule that left exclusivity clauses in effect would allow the vast majority of the harms caused by such clauses to continue for years, and we believe that it is strongly in the public interest to prohibit such clauses from being enforced," it would be difficult to conclude that allowing DBS providers to use the public airwaves to deliver services that are provided under exclusive access arrangements serves the public interest.

There is ample Commission precedent that supports the linkage of "public interest" requirements and pro-competitive regulation of DBS. For example, when the Commission adopted auction rules for DBS licenses in 1995, the Commission stated that it was required under Title III to weigh the effect on competition as part of its public interest assessment.[25] The Commission ultimately declined to impose more sweeping regulation beyond a single structural rule as to how the auction should proceed, but noted that it would "continue to have rulemaking authority to remedy anticompetitive conduct … and [would] consider additional rules if experience indicates that they are required."[26] Similarly, in a 1998 rulemaking implementing

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24 *Id.* § 335(a) (emphasis added).

25 *See Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712, ¶ 23 (1995) (citing *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 88 (1953) and *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980)).

26 *Id.* ¶ 31.

Section 335, the Commission declined to "impose upon the DBS industry *now*" the public interest programming regulations imposed on cable operators.[27] However, the Commission never evinced any doubt that it would have the authority to impose regulatory parity between cable and DBS -- that "other requirements" in Section 335(a) could be interpreted to impose on DBS all the obligations imposed on cable -- if market conditions later proved to justify this approach (*e.g.*, to "remedy anticompetitive conduct").[28]

Thus, the "ancillary authority" that was invoked to establish rules applicable solely to a subset of MVPDs should be equally available for other MVPDs not covered by the *MDU Order,* and the Commission has additional statutory authority it can invoke for those, like DBS, that make use of the public airwaves. Conversely, if the Commission finds that it does not have the requisite authority to treat all MVPDs the same in this situation, retaining the prohibition only as to cable operators would be ineffective and counterproductive and, as such, should be rescinded.

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[27] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd 23254, ¶¶ 59-60 (1998) (emphasis added).

[28] *Id*. ¶ 56.

III. CONCLUSION

The *Further Notice* gives the Commission an opportunity to rectify the competitive imbalance it created with the *MDU Order*. It should not let that opportunity pass. Short of reversing the *MDU Order* in whole, the small steps outlined above will help unwind some of the competitive disparities wrought by the Commission.

Respectfully submitted,

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